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Revisiting U.S. Labor Law as a Restriction to Works Councils: A Key for U.S. Global Competitiveness

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REVISITING U.S. LABOR LAW AS A RESTRICTION TO WORKS COUNCILS: A KEY FOR U.S. GLOBAL COMPETITIVENESS

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ABSTRACT

Works councils, institutionalized bodies that facilitate representative communication between an employer and its employees, have expanded on a global scale in recent decades due, in large part, to their ability to increase employee representation, firm productivity and profitability, and social responsiveness. The United States has been notably absent from the global works-councils movement primarily because of an outdated, New Deal-era labor-relations system that generally prohibits these types of worker participation structures. The Authors provide a detailed overview of U.S. labor law in relation to works councils before presenting three contrasting options for increasing worker participation in the United States via works councils, thereby increasing U.S. global competitiveness.

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I. INTRODUCTION

In the fall of 2013, famed, German-owned automobile manufacturer, Volkswagen AG, and the United Automobile Workers of America (UAW) Union captured international headlines when they announced they were working toward unionizing an automobile plant in Chattanooga, Tennessee, for the express purpose of establishing a German-style works council.¹ This story was newsworthy because the United States, which has one of the lowest union-density rates of all western democracies,² also has no works councils. Relatedly, the article indicated labor and management intended to

1. See Steven Greenhouse, *VW and Its Workers Explore a Union at a Tennessee Plant*, N.Y. TIMES (Sept. 6, 2013), <http://www.nytimes.com/2013/09/07/business/vw-and-auto-workers-explore-union-at-tennessee-plant.html>.

2. See, e.g., OECD, OECD EMPLOYMENT OUTLOOK 2017, at 134 (2017), http://www.keepeek.com/Digital-Asset-Management/oecd/employment/oecd-employment-outlook-2017_empl_outlook-2017-en#page134. According to the Organisation for Economic Co-operation and Development (OECD), union density averages approximately 17 percent across the thirty-five OECD countries, ranging from an approximate low of 4.5 percent in Estonia to 92 percent in Iceland. *Id.* According to a *Forbes* magazine article based on OECD union-density figures, the United States' then-10.6 percent union membership ranked 13th of 15 OECD countries surveyed. Niall McCarthy, *Which Countries Have the Highest Levels of Labor Union Membership?*, FORBES (June 20, 2017), <https://www.forbes.com/sites/niallmccarthy/2017/06/20/which-countries-have-the-highest-levels-of-labor-union-membership-infographic/#3c2ff8c733c0>.

cooperate.³ In a statement released on September 6, 2013, UAW President Bob King remarked:

VW workers in Chattanooga have the unique opportunity to introduce this new model of labor relations to the United States, in partnership with the U.A.W. Such a labor relations model would give workers the job security that would accompany their having an integral role in managing the company and a vehicle to provide input on workplace improvements that will contribute to the company's success.⁴

Volkswagen employees ultimately rejected the union in a 712–626 vote against unionization.⁵ The vote may not seem like a close election, given the fact management did not even oppose the union, but the political atmosphere complicated that conclusion.⁶ Tennessee's Governor, Bill Haslam, and Chattanooga's former mayor, U.S. Senator Bob Corker, came out early against the union.⁷ For example, Governor Haslam claimed: "One of the reasons is, we've had several prospective companies say that decision will impact whether we choose Tennessee or somewhere else."⁸ Senator Corker called Volkswagen the "laughing stock" of the business world for failing to oppose the union and blaming the UAW for the auto industry's troubles.⁹

While there appears to be an ideological divide between Republicans and Democrats regarding unions, no such divide has emerged regarding works councils, institutionalized bodies that facilitate representative communication between an employer and its employees.¹⁰ Perhaps this can

3. See Greenhouse, *supra* note 1.

4. UAW Statement on VW Works Council in Chattanooga, UAW (Sept. 6, 2013), <https://uaw.org/uaw-statement-on-vw-works-council-in-chattanooga/>.

5. Chris Isidore, *Volkswagon Employees Say 'No' to United Auto Workers in Tennessee*, CNN (Feb. 15, 2014), <https://www.cnn.com/2014/02/14/us/tennessee-vw-union-vote/index.html>.

6. *Id.*

7. Blake Farmer, *Volkswagon Union Opposed by Tennessee Republican Officials*, NPR (Oct. 21, 2013), <https://www.npr.org/2013/10/21/236983306/volkswagen-union-opposed-by-tennessee-republican-officials>.

8. *Id.*

9. *Id.*

10. See Joel Rogers & Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, in *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 6 (Joel Rogers & Wolfgang Streeck eds., 1995).

be attributed to the lack of works councils in the United States. However, the lack of opposition to works councils may also be attributable to the fact that, unlike unions which assume an adversarial relationship between workers and employers, works councils depend on cooperation. This cooperative and even collaborative model may be more compatible with U.S.-style capitalism.

Although one of the more important global trends in recent decades has been a movement toward greater worker participation in the form of works councils,¹¹ the United States has not benefited from this trend. Rather, the trend toward greater employee participation had its early origins in Germany and the German Works Council Act of 1920,¹² and the concept has spread rapidly in recent decades as other countries have developed their own versions of the process. Some form of works councils now exists in numerous countries ranging from Japan¹³ to Argentina¹⁴ to South Africa.¹⁵ In the European Union (EU), there are mandated European Works Councils for any company with more than 1,000 employees and at least 150 employees in each of two member countries.¹⁶ Additionally in 2002, another EU directive

11. See JEREMY WADDINGTON, *EUROPEAN WORKS COUNCILS: A TRANSNATIONAL INDUSTRIAL RELATIONS INSTITUTION IN THE MAKING* 1 (2011).

12. *Betriebsrätegesetz* [Works Council Act], Feb. 4, 1920, RGL I at 147 (Ger.), http://www.1000dokumente.de/pdf/dok_0133_brg_de.pdf (valid in the Weimar Republic of Germany from 1920 to 1934).

13. See generally Hisashi Takeuchi-Okuno, *The System of Employee Representation at the Enterprise in Japan*, in 11 JAPAN INST. FOR LABOUR POL'Y & TRAINING, *SYSTEM OF EMPLOYEE REPRESENTATION AT THE ENTERPRISE* 1 (2012), <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.11.pdf>.

14. See André Sobczak, *Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility*, 62 *INDUS. REL.* 466, 484 (2007), <https://hal-audencia.archives-ouvertes.fr/hal-00794647/document> (explaining that EU works councils' agreements are much less common outside of Europe but using Argentina and Brazil as examples of countries where EU firms have expanded and introduced works councils).

15. See generally Eddie Webster & Ian Macun, *A Trend Towards Co-Determination? Case Studies of South African Enterprises*, 2 *L., DEMOCRACY & DEV.* 63 (1998).

16. 1994 O.J. (L 254) 64, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31994L0045&from=EN>, as amended by Directive 2009/38/EC, of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, art. 2(1)(a), 2009 O.J. (L 122) 33, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32009L0038>.

required each EU member country to develop legislation covering employers with more than 50 employees and requiring an inform-and-consult or inform-and-consent system for employee participation.¹⁷ At a minimum, council rights involve an exchange of information, whereby management is required to inform workers of key workplace decisions and plans.¹⁸ In many countries, works councils also have consultation rights, which require management to not only inform the council of the managerial intentions, but also to wait for a formulated response or counterproposal that must be taken under consideration before a final decision can be made.¹⁹ Finally, in some countries such as Germany, councils operate within a system of codetermination, where certain managerial actions may only be taken with the consent of the council, which effectively provides the council with veto rights.²⁰

The works-councils phenomenon has generated significant attention from global management researchers and labor-relations scholars in recent years.²¹ Such attention appears well-merited for at least two compelling reasons. First, traditional forms of employee representation, ranging from the centralized bargaining and political exchange once common in Europe to the decentralized collective bargaining systems of North America, may no longer be adequate in providing for full worker representation in today's

17. 2002 O.J. (L 80) 29, https://eur-lex.europa.eu/resource.html?uri=cellar:f2bc5eea-9cc4-4f56-889d-3cc4c5ee5927.0004.02/DOC_1&format=PDF.

18. See Rogers & Streeck, *supra* note 10, at 8.

19. See *id.* For an in-depth discussion of how consultation rights operate in the EU context of mass economic dismissals, see generally Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System*, 14 EMP. RTS. & EMP. POL'Y J. 55, 82–86 (2010) (describing and analyzing consultation rights under EU's collective redundancies directive).

20. See Walther Müller-Jentsch, *Germany: From Collective Voice to Co-Management*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 59–60 (Joel Rogers & Wolfgang Streeck eds., 1995) (noting those effective veto powers are, however, tied to managerial actions related to social matters, personnel, planning, staff movements, etc.).

21. See, e.g., John T. Addison, Paulino Teixeira & Thomas Zwick, *German Works Councils and the Anatomy of Wages*, 63 INDUS. & LAB. REL. REV. 247 (2010); Martin Behrens, *Still Married After All These Years? Union Organizing and the Role of Works Councils in German Industrial Relations*, 62 INDUS. & LAB. REL. REV. 275 (2009); Annette van den Berg, Yolanda Grift & Arjen van Witteloostuijn, *Managerial Perceptions of Works Councils' Effectiveness in the Netherlands*, 50 INDUS. REL. 497 (2011).

modern business and economic environments.²² In the United States, for example, unionization rates have fallen to approximately 10.7 percent of the workforce, or just 14.8 million workers,²³ while surveys suggest that more than 100 million U.S. workers with no collective representation desire some form of collective voice, reflecting a substantial “representation gap” that compromises basic democratic ideals and increases interest in other types of employee representation, such as works councils.²⁴

Second, works councils appear capable of increasing firm productivity and bottom-line profitability.²⁵ This effect may result in large part due to the regular consultation and information exchange processes between workers and management that are facilitated by works councils. Such open exchanges of information tend to reduce information asymmetries and lower the cost of information to both parties, leading to increased trust and cooperation between management and employees.²⁶ Empirical evidence lends support for this position. For instance, it has been found that establishments with works councils are, on average, 6.4 percent more productive than firms without works councils, a figure that may in fact underestimate some of the positive effects of works councils.²⁷ Similarly, the effects of works councils on firm profits are both positive and significant when using an objective measure of firm profitability.²⁸ Along the same lines, Hirsch, Schank, and Schnabel, economic scholars and researchers, found that works councils lead to lower separation rates, especially for low-tenure workers.²⁹ In addition,

22. See, e.g., Steffen Mueller, *Works Councils and Establishment Productivity*, 65 INDUS. & LAB. REL. REV. 880, 880–81 (2012) [hereinafter Mueller, *Establishment Productivity*]; see Joel Rogers, *United States: Lessons from Abroad and Home*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 376 (Joel Rogers & Wolfgang Streeck eds., 1995).

23. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, UNION MEMBERS SUMMARY 2 (2018), <https://www.bls.gov/news.release/pdf/union2.pdf> (noting the 2017 union rate was half of what it was in 1983).

24. See, e.g., Mueller, *Establishment Productivity*, *supra* note 22; Rogers & Streeck, *supra* note 10, at 4.

25. See, e.g., Steffen Mueller, *Works Councils and Firm Profits Revisited*, 49 BRITISH J. INDUS. REL. 27 (2011) [hereinafter Mueller, *Firm Profits*] (noting empirical studies in Germany that indicate works councils increase productivity); see also Rogers & Streeck, *supra* note 10, at 4; Mueller, *Establishment Productivity*, *supra* note 22.

26. See Rogers & Streeck, *supra* note 10, at 4.

27. See Mueller, *Establishment Productivity*, *supra* note 22, at 891.

28. See Mueller, *Firm Profits*, *supra* note 25, at 27.

29. See Boris Hirsch, Thorsten Schank & Claus Schnabel, *Works Councils and Separations: Voice, Monopoly, and Insurance Effects*, 49 INDUS. REL. 566, 585–86 (2010).

van den Berg, Grift, and van Witteloostuijn, also economic scholars, reported a positive association between works councils and organizational performance, especially when coupled with a positive attitude of managers toward the councils.³⁰ Finally, beyond firm profitability and productivity, works councils may also contribute to the overall good of society by encouraging the enforcement of legal requirements in areas such as environmental protection,³¹ gender equality,³² and health and safety.³³

Despite wide application on a global scale due in large part to the practical advantages described above, works councils are noticeably missing from the employee-relations landscape in the United States. The New Deal system of labor relations, founded upon the Wagner Act of 1935³⁴ and the Taft-Hartley Act of 1947,³⁵ was developed as a means for allowing workers to select an exclusive collective-bargaining agent via secret ballot in a process free of managerial interference.³⁶ This system was based on a series of premises including: (1) a stark contrast between production workers who were thought to be singularly concerned with wages and working conditions and managers who were assumed fully capable of operating their businesses without employee input; (2) a closed economy with little or no global wage competition; (3) assembly-line mass production of standardized goods by an unskilled and semiskilled workforce; and (4) family wages and benefits focused on the lifetime employment of a male breadwinner.³⁷ As Rogers noted:

Put simply, the world described by these premises no longer exists—workers have other interests, management needs more worker involvement, the economy is more open, production is more flexible and

30. See Annette van den Berg, Yolanda Grift & Arjen van Witteloostuijn, *Works Councils and Organizational Performance: The Role of Top Managers' and Work Councils' Attitudes in Bad Vis-à-Vis Good Times*, 32 J. LAB. RES. 136, 150 (2011).

31. See Jan Erik Askildsen, Uwe Jirjahn & Stephen C. Smith, *Works Councils and Environmental Investment: Theory and Evidence from German Panel Data*, 60 J. ECON. BEHAV. & ORG. 346, 350–55 (2006).

32. See John S. Heywood & Uwe Jirjahn, *Family-Friendly Practices and Worker Representation in Germany*, 48 INDUS. REL. 121, 142 (2009).

33. See David Weil, *Are Mandated Health and Safety Committees Substitutes for or Supplements to Labor Unions?*, 52 INDUS. & LAB. REL. REV. 339, 351–52 (1999).

34. National Labor Relations Act of 1935 §§ 1–19, 29 U.S.C. §§ 151–169 (2012).

35. Labor Management Relations Act of 1947 § 301, 29 U.S.C. § 185 (2012).

36. See *id.* See generally National Labor Relations Act of 1935.

37. See Rogers, *supra* note 22, at 376–77.

quality driven, jobs are less stable, and the workforce is more diverse—and the system based on them works poorly in the world that does.³⁸

The inability of U.S. companies to participate in the worldwide phenomenon of works councils represents a potentially untapped key for increasing U.S. global competitiveness. Despite a strong call for addressing this issue over two decades ago,³⁹ little or no substantive action has subsequently been taken to increase employee participation in the context of U.S. labor law.⁴⁰ The purpose of this Article, therefore, is to provide a detailed review of U.S. labor law in relation to works councils before presenting three contrasting legal options for increasing worker participation in the United States via works councils, thereby increasing U.S. global competitiveness.

II. THE UNITED STATES' EXPERIENCES WITH WORKS COUNCILS IN THE CONTEXT OF U.S. LABOR LAW

In the United States, the experience with works-council models has been circumscribed and, to a significant degree, limited by the provisions of the National Labor Relations Act.⁴¹ Passed in 1935 as the Wagner Act⁴² and later amended by the Taft-Hartley Act⁴³ in 1947, the law primarily has provided federal protection to employees in the private sector who desire to unionize or to otherwise engage in concerted, protected activity. The cornerstone of the Act can be found in Section 7 which grants:

Employees . . . have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement

38. *See id.* at 376.

39. *See, e.g.,* Rogers & Streeck, *supra* note 10, at 4.

40. *See* Mueller, *Establishment Productivity*, *supra* note 22, at 881.

41. *See generally* Orly Lobel & Anne Marie Lofaso, *System of Employee Representation at the Enterprise: The US Report*, in 11 JAPAN INST. FOR LABOUR POL'Y & TRAINING, *SYSTEM OF EMPLOYEE REPRESENTATION AT THE ENTERPRISE* 153 (2012), <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.11.pdf>.

42. *See* National Labor Relations Act of 1935 § 1, 29 U.S.C. § 151 (2012) (popularly known as the Wagner Act).

43. *See* Labor Management Relations Act of 1947 § 301, 29 U.S.C. § 185 (2012) (popularly known as the Taft-Hartley Act).

requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3)⁴⁴

The Act primarily established a protected pathway to unionization for employees and created the concept of exclusivity, whereby an employer could only deal with the union selected by the employees to represent them in all matters involving wages, hours, and conditions of employment. This concept is found in Section 9(a) of the Act:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment⁴⁵

Early on, the Supreme Court, in *J. I. Case Co. v. NLRB*, developed the concept of exclusivity in the context of a bargaining dispute involving a union that won a secret-ballot election and was certified as the Section 9(a) majority representative of a bargaining unit that included employees who held individual contracts with the employer.⁴⁶ That employer refused to bargain with the union, notwithstanding its majority status, on grounds that collective bargaining may affect the terms and conditions of employment it had already agreed to by individual contract with individual employees.⁴⁷ The Court held that the employer's refusal to bargain in these circumstances violated Section 8(a)(5),⁴⁸ notwithstanding the existence of the individual contracts.⁴⁹

In a unionized setting, an employer cannot normally deal unilaterally with individual employees on mandatory subjects of bargaining.⁵⁰ Nor may

44. See National Labor Relations Act of 1935 § 7, 29 U.S.C. § 157.

45. See *id.* § 9, 29 U.S.C. § 159.

46. See *J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944) (holding that an employer violates Section 8(a)(5) when it refuses to bargain over terms and conditions of employment that may affect individual contracts the employer has with some of its employees).

47. *Id.* at 334.

48. National Labor Relations Act of 1935 § 8(a)(5), 29 U.S.C. § 158(a)(5) (requiring employers to bargain with duly elected representatives of an employee unit).

49. *J. I. Case Co.*, 321 U.S. at 339.

50. See *id.* A significant corollary to this rule, which stems from *J. I. Case Co.*, is that unions may contractually waive exclusivity and permit direct dealing where the collective-bargaining agreement serves as a floor of rights. The most prominent example

an employer deal with other employee organizations on such topics.⁵¹ Thus, an employee committee that might be formed to deal with management on wages, hours, or other terms and conditions of employment is legally viewed as interfering with the “exclusive right” of the certified union to cover these areas.⁵² Any effort by an employer to establish such employee committees or otherwise deal with them on such topics may result in a certified union bringing a Section 8(a)(5) charge,⁵³ alleging refusal to bargain with the “exclusive” representative.⁵⁴

However, even where there is no union on the scene, the Act still constrains free-and-easy dealings with employee committees or councils that touch upon working condition issues.⁵⁵ Through the law’s definition of a “labor organization,” and its prohibition of employer interference or domination of such labor organizations, employers have had to tread cautiously in trying to establish or deal with employee committees that might enhance efficiency and harmony in the workplace.⁵⁶ The core concept of exclusivity in unionized settings, coupled with early fears of employers establishing “company unions” to avoid real collective bargaining, have all had the effect of placing roadblocks in front of any drive toward works councils in the United States.⁵⁷

The Act does not ban all interactions between management and employee committees or councils, but severe limitations on such interactions

of this arrangement is found in professional sports contracts. For example, the 2017–2021 Basic Agreement between Major League Baseball and the MLB Players Association provides: “A Player, if he so desires, may designate an agent to conduct on his behalf, or to assist him in, the negotiation of an individual salary and/or Special Covenants to be included in his Uniform Player’s Contract with any Club, provided such agent has been certified to the Clubs by the Association as authorized to act as a Player Agent for such purposes.” See *Negotiation and Approval of Contracts*, 2017–2021 BASIC AGREEMENT 2, <http://www.mlbplayers.com/pdf9/5450407.pdf> (last visited July 4, 2018).

51. National Labor Relations Act of 1935 § 9(a), 29 U.S.C. § 159(a).

52. *See id.*

53. *See id.* § 8(a)(5), 29 U.S.C. § 158(a)(5).

54. *See id.*; *see also id.* § 9(a), 29 U.S.C. § 159(a).

55. *See id.* § 2(5), 29 U.S.C. § 152(5) (casting a broad definition of “labor organization” and thus establishing a broad zone of protection for workers and broad barriers for engagement by management).

56. *See id.*

57. William N. Cooke, *Evolution of the National Labor Relations Act*, in *UNION ORGANIZING AND PUBLIC POLICY: FAILURE TO SECURE FIRST CONTRACTS* 8–13 (1985), http://research.upjohn.org/cgi/viewcontent.cgi?article=1131&context=up_bookchapters.

exist because of the interplay of two central provisions of the Act, one defining a “labor organization” and the other forbidding employer domination of such organizations.⁵⁸ The first provision in Section 2(5) defines a labor organization as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.”⁵⁹ The second is Section 8(a)(2) which makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it”⁶⁰ This provision was undoubtedly designed to nullify any employer efforts to “control” unionization by establishing and supporting their own company-created unions,⁶¹ a concern that was very much on the minds of the bill’s original supporters, including Senator Wagner.⁶²

The threshold question in litigation settings is often whether a “committee or plan” is a labor organization, because if a “committee or plan” is not found to be a labor organization, then no Section 8(a)(2) violation is possible and an employer would be free to deal with the committee.⁶³ The problem is that Section 2(5)’s definition of labor organization is so broad that many committees or councils, regardless of internal form or structure, meet the statutory threshold requirements.⁶⁴ Moreover, under Section 2(5), the range of subjects a labor organization might deal with is sweeping.⁶⁵ However, central to the analysis is the question of what it means for such a committee to be “dealing with” management.⁶⁶ Does *dealing with* imply only a collective-bargaining-type relationship as one might think of when considering standard labor unions or could it mean something more expansive?

The Supreme Court ultimately resolved this issue in *NLRB v. Cabot Carbon Co.*, a case involving an employee committee system where the

58. See National Labor Relations Act of 1935 § 8(a)(2), 29 U.S.C. § 158(a)(2).

59. See *id.*

60. *Id.*

61. See *id.*

62. 79 CONG. REC. 2371–72 (1935) (statement of Sen. Wagner).

63. See National Labor Relations Act of 1935 § 8(a)(2), 29 U.S.C. § 158(a)(2).

64. See *id.*

65. See *id.*; see also *id.* § 2(5), 29 U.S.C. § 152(5).

66. See *id.* § 2(5), 29 U.S.C. § 152(5).

elected employee representatives met regularly with management to discuss matters of mutual interest, including seniority, time off, job classifications, and other conditions of employment.⁶⁷ The Court found that the employee committees were indeed labor organizations dealing with management.⁶⁸ The Court found that discussions between the committee and management on topics such as seniority, job classifications, and the like, constituted *dealing with*.⁶⁹ In essence, the Court held that the Section 2(5) phrase *dealing with* was *not* to be equated with formal collective bargaining, but constituted a lower standard of relationship.⁷⁰ After tracing Section 2(5)'s legislative history, the Court concluded, "Congress, by adopting the broad term 'dealing' and rejecting the more limited term 'bargaining collectively,' did not intend that the broad term 'dealing with' should be limited to and mean only 'bargaining with'"⁷¹

Moreover, the fact that the committees only made recommendations to management—and that management at all times held the final authority as to whether to accept or reject such recommendations—was irrelevant in determining labor-organization status.⁷² Indeed, in subsequent cases, the fact that employee committees or participation plans only communicated their "views" and did not make formal recommendations was also not dispositive in determining Section 2(5) status.⁷³

A. Safe Committees Under the Act

As noted above, while the Act is an impediment to full works-council concepts, it is not absolute in that regard. Some employee committees are safe from scrutiny—an employer's interaction with such committees will be deemed permissible—and not every employee committee that interacts with management will be deemed a Section 2(5) labor organization.⁷⁴ For example, an employee committee that is limited to topics such as operational or labor efficiency problems and does not deal with bargainable matters (e.g., wages, hours, working conditions) will not be deemed a labor

67. See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 205–06 (1959).

68. See *id.* at 209.

69. *Id.* at 217–18.

70. See *id.* at 218–19.

71. See *id.* at 210–11.

72. *Id.* at 214.

73. See *id.*

74. See *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 895 (1993).

organization.⁷⁵ Further, even if the committee's agenda covers negotiable matters, if an employer completely delegates managerial authority to that employee committee, it will not commit a Section 8(a)(2) violation because it will not be dealing with the committee.⁷⁶

This viewpoint found its first expression in *General Foods Corp.*⁷⁷ There, the employer specifically delegated certain job assignments and scheduling responsibilities to four employee work teams.⁷⁸ These work teams (called "job enrichment program" teams) investigated plant safety and reevaluated job procedures.⁷⁹ While these teams were clearly dealing with Section 2(5) subjects and clearly had interaction with management, the National Labor Relations Board (NLRB) found that the teams were not labor organizations because the activities of the teams involved managerial functions that were entirely delegated to employees and consequently did not involve dealing with the employer within the meaning of Section 2(5).⁸⁰ Similarly, in a more recent decision, the NLRB ruling in the *Crown Cork & Seal Co.* case dictated that work production teams charged with deciding and acting upon production issues, work quality, training, attendance, safety, maintenance, and discipline short of suspension were not labor organizations.⁸¹ The decision underscored the fact that because the authority exercised by the committee was "unquestionably managerial," it was comparable to that exercised by a frontline manager or supervisor.⁸² Because the teams performed the functions that a manager would perform with limited oversight, they could not be found to be labor organizations dealing with management; thus, no violation was found.⁸³

One federal court went even further in seemingly sanctioning an employee committee that neither dealt with strictly managerial functions nor had been delegated final responsibility for any operational matters.⁸⁴ In the case of *NLRB v. Streamway Division of Scott & Fetzer Co.*, a three-judge

75. See *Gen. Foods Corp.*, 231 N.L.R.B. 1232, 1235 (1977).

76. See *id.*

77. See *id.*

78. *Id.* at 1233.

79. *Id.* at 1234.

80. See *id.*

81. See *Crown Cork & Seal Co.*, 334 N.L.R.B. 699, 701 (2001).

82. *Id.*

83. *Id.*

84. See *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 294-95 (6th Cir. 1982).

panel of the federal Sixth Circuit Court of Appeals refused to enforce a finding that the employer had unlawfully assisted an employee committee that had been set up to improve communications on various workplace issues.⁸⁵ The Court observed, “[N]ot all management efforts to communicate with employees concerning company policy are forbidden on pain of violating the Act. An overly broad construction of the statute would be as destructive of the objects as the Act as ignoring the provisions entirely.”⁸⁶ The Court then cited with favor to Judge Wisdom’s dissent in *NLRB v. Walton Manufacturing Co.*:

To my mind, an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor.⁸⁷

Although the Sixth Circuit’s opinion appears to be a minority view, it is noted here as an important perspective on employee–employer joint efforts to improve the “general welfare” of employees.⁸⁸

Another committee that will not be found to be a Section 2(5) labor organization dealing with management is one that serves an adjudicatory function. A committee that simply adjudicates (e.g., a grievance committee with full authority to act on a given case) has been found not to be a Section 2(5) labor organization.⁸⁹ For example, the ruling in *Sparks Nugget, Inc.* did not find labor organization status when a joint employer–employee grievance committee performed a “purely adjudicatory” function and thus was not dealing with management.⁹⁰ The committee only convened to hear grievances filed by individual employees and made final decisions on such grievances.⁹¹

Years later, a similar ruling in *Syracuse University* upheld the finding that Syracuse University’s Staff Complaint Process (SCP) was not a labor

85. *Id.*

86. *Id.* at 292.

87. *Id.* (quoting *NLRB v. Walton Mfg. Co.*, 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting)).

88. *See id.*

89. National Labor Relations Act of 1935 § 2(5), 29 U.S.C. § 152(5) (2012).

90. *Sparks Nugget, Inc.*, 230 N.L.R.B. 275, 276 (1977).

91. *Id.*

organization within the meaning of Section 2(5).⁹² The SCP was a complaint-resolution procedure designed to resolve employee relations issues between nonbargaining unit employees and their supervisors.⁹³ The university introduced the new procedure in 2003, and it began to train volunteer employee participants on the techniques of mediation and problem solving.⁹⁴ The SCP operated during working hours using facilities and supplies provided by the university.⁹⁵ The human-resources department played an active role in the SCP, with the staff-complaint coordinator being an HR employee.⁹⁶ HR trained the volunteers and served as a resource for questions about the SCP, while managers and supervisors were eligible to serve as staff advocates, mediators, and panel members.⁹⁷ The decision in this case concluded that the SCP was not a labor organization because its purpose was not to deal with the employer on terms and conditions of employment.⁹⁸ Rather, its purpose was limited to an adjudicatory function.⁹⁹

B. Electromotion and Its Progeny

While there had previously been, as noted, considerable case law regarding the definition of a labor organization under Section 2(5) and Section 8(a)(2), the NLRB issued one of its pivotal decisions in this area in 1992, reexamining the entire field and providing future guidance as to the meaning of both sections.¹⁰⁰ In *Electromotion, Inc.*, the Board held that certain employee “action committees” were labor organizations under Section 2(5) of the National Labor Relations Act because they sought resolution of matters of employee concern, including time-off rules and compensation issues.¹⁰¹ In this case, the employer, concerned about a variety of employee complaints, decided that “the best course of action would be to involve the employees in coming up with solutions to these issues.”¹⁰² Accordingly, the company set up five ad hoc employee committees to deal

92. See *Syracuse Univ.*, 350 N.L.R.B. 755, 755 (2007).

93. *Id.*

94. *Id.* at 763.

95. *Id.* at 755.

96. *Id.* at 756.

97. *Id.*

98. *Id.* at 758.

99. *Id.*

100. *Electromotion, Inc.*, 309 N.L.R.B. 990, 990 (1992).

101. See *id.* at 997.

102. See *id.* at 1016.

with five particular workplace issues.¹⁰³ The committees would meet to discuss the problems and come up with recommendations for management. Management designated the areas that each of the five committees would work on: absenteeism/infractions, no smoking policy, communications network, pay progression for premium positions, and attendance bonus program.¹⁰⁴ Management decided that each committee would be comprised of up to six hourly employees, one or two management representatives, and the personnel manager.¹⁰⁵ Ultimate selection of committee members would be done by management, following a request for volunteers.¹⁰⁶ Managers also served on the committees.¹⁰⁷

The committees met once a week in the company conference room.¹⁰⁸ Employees were paid for their time, and they were provided with supplies, calculators, and other support to do their work.¹⁰⁹ The committees began their work, but not long passed before the company received notice that a union was demanding recognition.¹¹⁰ With that information, management withdrew the managers from the committees but told the committees they themselves could continue to meet.¹¹¹ There was no evidence that the committees had been formed to blunt the union drive in any way or that management even knew about it at the time the committees were formed.¹¹² Nevertheless, the administrative law judge found that the committees were unlawfully dominated labor organizations within the meaning of Sections 2(5) and 8(a)(2).¹¹³

With the case on appeal to the full Board, the Board held oral arguments due to the importance of the issues, and many amici curiae also weighed in on both sides of the question.¹¹⁴ The Board itself cast the issues to be decided with these two questions: “(1) At what point does an employee

103. *Id.* at 1017.

104. *Id.*

105. *Id.* at 991.

106. *Id.* at 1017.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1018.

113. *Id.*

114. *Id.* at 990 n.2 (listing amicus briefs submitted from a mix of lawmakers and labor organizations).

committee lose its protection as a communication device and become a labor organization? [and] (2) What conduct of an employer constitutes domination or interference with the employee committee?"¹¹⁵

In its final decision, the Board began with a review of the history of Section 2(5), specifically quoting Senator Wagner himself when speaking about his bill and the evils of company unions.¹¹⁶ The Senator said:

Genuine collective bargaining is the only way to attain equality of bargaining power. . . . The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since the enactment of [the National Industrial Recovery Act]. Such a union makes a sham of equal bargaining power. . . . [O]nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees. For these reasons, the very first step toward genuine collective bargaining is the abolition of the employer dominated union as an agency for dealing with grievances, labor disputes, wages, rates, or hours of employment.¹¹⁷

The Board then reviewed the legislative history, which supported the contention that the Congress was defining labor organizations broadly and was particularly concerned about employer involvement in the formation of such organizations.¹¹⁸ It noted that, in the end, any employee group, whether representative or not, "may meet the statutory definition of 'labor organization' even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly and does not require payment of initiation fees or dues."¹¹⁹

In considering the "interplay" between Section 2(5) and Section 8(a)(2),¹²⁰ the Board turned to *NLRB v. Cabot Carbon Co.*¹²¹ The Board noted that the Supreme Court had reviewed the legislative history of the 1947 Taft-Hartley Act and underscored the rejection by House and Senate

115. *Id.* at 990.

116. *Id.* at 992–93.

117. *Id.*

118. *Id.* at 993.

119. *Id.* at 994 (citations omitted).

120. See National Labor Relations Act of 1935 §§ 2(5)–(8)(a)(2), 29 U.S.C. §§ 152(5)–(8)(a)(2) (2012).

121. *Electromation, Inc.*, 309 N.L.R.B. at 995 (citing *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959)).

conferees of a proposed new Section 8(d)(3).¹²² Passed by the House, that section would have "expressly permitted 'forming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions' in the absence of a certified or recognized" union.¹²³ This bill was rejected, thus reemphasizing the limitations that the original Act was placing on employers in terms of dealing with employee committees.¹²⁴ In addition, as noted earlier, the Court in that case broadly defined the term *dealing with*.¹²⁵

The Board, however, underscored what had already begun to emerge in the case law, namely that despite the broad reach of Section 2(5), many employee committees *will not* be deemed labor organizations.¹²⁶ As to the issue of "domination" under Section 8(a)(2), the Board noted that there is no question that a labor organization that is "the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2)."¹²⁷ On the other hand, "when the formulation and structure of the organization is determined by the employees," then there can be no domination.¹²⁸ The Board also explained that the employer's motive is irrelevant in these cases, as is the perception of the employees themselves as to whether the committee is a labor organization.¹²⁹ Applying these principles here, the Board had no trouble finding that the action committees were labor organizations and thereby concluded that the activities of the committees constituted dealing with the employer, the subject matter involved "conditions of employment," and the committees acted in a representational capacity.¹³⁰

The Board also found domination existed, based on the fact that it was

122. *Id.*

123. *Id.* (quoting the *Cabot Carbon Co.* Court's evaluation of rejected legislative language).

124. *Id.*

125. *Id.*

126. *See id.* at 995-96.

127. *Id.* at 995.

128. *Id.* at 995-96 (citing *Duquesne Univ. of the Holy Ghost*, 198 N.L.R.B. 891, 892-93 (1972)).

129. *Id.* (citations omitted).

130. *Id.* at 997.

the employer's idea to form these committees and findings that the employer wrote the purposes and goals of the committees, determined how many members would be on the committees, and appointed management representatives to the committees to facilitate discussion.¹³¹ Finally, there was paid time for committee activities and other employer support.¹³² Although such support by itself would not have been a Section 8(a)(2) violation, it was cited as an adjunct to the rest of the unlawful domination.¹³³

Interestingly, while all four members of the Board found unlawful domination existed under the particular facts of the case, three members in their concurring opinions emphasized the benefit of certain employee committees and sought to reassure the management world that the decision would not sound the death knell of all such committees.¹³⁴ For example, Dennis Devaney, an NLRB member, in his concurring opinion tried to minimize the impact of the Board's ruling, expressing his belief that many employee committees could exist and work with management while not running afoul of the Act.¹³⁵ He felt that these types of committees focusing on "safety, quality control, and productivity" and other managerial issues were perfectly permissible because of the Section 2(5) definition of a labor organization, which indicates the organization must deal with management on "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."¹³⁶ Member Devaney's basic view, contrary to his colleagues, was that he "would not be inclined to find that an employee group constituted a statutory labor organization unless the group acted *as a representative* of other employees."¹³⁷

Member Clifford Oviatt also concurred in the result but added his own view of the situation.¹³⁸ He noted that employee participation groups (e.g., so-called "quality circles"), which may be established by management, whose purpose is to use employee expertise by having the group examine certain operational problems, such as labor efficiency and material waste, should not be viewed as implicating matters identified in Section 2(5).¹³⁹ He

131. *Id.* at 990.

132. *Id.* at 998.

133. *See id.*

134. *Id.* at 998–99.

135. *Id.* at 999 (Devaney, Bd. Member, concurring).

136. *Id.* at 993; *id.* at 999 n.1.

137. *Id.* at 1002 (emphasis added).

138. *Id.* at 1003–05 (Oviatt, Bd. Member, concurring).

139. *Id.* at 1004.

noted that this is also true of “quality-of-work-life programs” that involved a company’s attempt to draw on the creativity of employees by including them in decisions that affect their work lives and other such programs that stress joint problem-solving structures to engage management and employees in finding ways of improving operational functions.¹⁴⁰ He added:

Where there is a labor union on the scene, these employee-management cooperative programs may act as a complement to the union. They can not, however, lawfully usurp the traditional role of the Union in representing the employees in collective bargaining about grievances, wages, hours, and terms and conditions of work. Where no labor union represents the employees, these programs are often established to open lines of communication so that the operation may take advantage of employee technical knowledge and expertise. . . . Certainly, I find nothing in today’s decision that should be read as a condemnation of cooperative programs and committees of the type I have outlined above. The statute does not forbid direct communication between the employer and its employees to address and solve significant productivity and efficiency problems in the workplace. In my view, committees and groups dealing with these subjects alone plainly fall outside the Section 2(5) definition of “labor organization”¹⁴¹

However, Member John Raudabaugh, in his concurrence, did not feel as confident as his colleagues regarding the viability of most employee plans or committees under the case law.¹⁴² In fact, he seemed to feel just the opposite—that most such committees would be viewed as Section 2(5) labor organizations—and noted that “[e]ven if the committee’s stated purpose is to deal only with such entrepreneurial concerns as product quality or workplace efficiency, it seems clear that the committee, in order to achieve its purpose, would have to consider one or more of the subjects listed in Section 2(5).”¹⁴³ While his perspective was that most employee committees would be found to be labor organizations, whether there was *unlawful domination* of such organizations was, however, another matter.¹⁴⁴ Taking into account the benefit of the many cooperative employee–employer committees that help productivity and efficiency in the workplace, Member Raudabaugh proposed a four-step test to determine Section 8(a)(2)

140. *Id.*

141. *Id.* at 1004–05.

142. *Id.* at 1005–15 (Raudabaugh, Bd. Member, concurring).

143. *Id.* at 1008.

144. *Id.* at 1013–14.

violations:

In my view, the answer to the question turns on the following factors: (1) the extent of the employer's involvement in the structure and operation of the committees; (2) whether the employees, from an objective standpoint, reasonably perceive the EPP [(employee participation plan)] as a substitute for full collective bargaining through a traditional union; (3) whether employees have been assured of their Section 7 right to choose to be represented by a traditional union under a system of full collective bargaining; and (4) the employer's motive in establishing the EPP. I would consider all four factors in any given case. No single factor would necessarily be dispositive.¹⁴⁵

While never adopted in subsequent case law, Member Raudabaugh's four-point test may constitute a different method of analysis for future cases, serve as the basis for new legislation, or both.¹⁴⁶

Shortly after *Electromation*, in *E. I. du Pont de Nemours & Co.*, the Board similarly found that certain employee safety committees were also labor organizations and, in at least one case, employer dominated.¹⁴⁷ In this case, six safety committees and one fitness committee were deemed labor organizations and employer dominated.¹⁴⁸ Management had established the committees and controlled their administration by determining the composition of the committee and having a management member conduct and lead the meetings.¹⁴⁹ While management members can be on the committee, the Board said they must be in the minority and cannot exercise veto power over decisions.¹⁵⁰ In this case, a union was already the certified representative of the employees as well.¹⁵¹ The Board reviewed the case law again and reemphasized at the outset some general principles.¹⁵² First, the concept of *dealing with* as used in Section 2(5) does not have to involve formal bargaining, but instead is satisfied when there is a "bilateral mechanism" between the parties, defined as a situation in which a group of

145. *Id.* at 1013.

146. *See id.*

147. *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 893 (1993).

148. *Id.*

149. *Id.* at 896 (noting the management member of the committee had the power to veto any decision reached by the committees).

150. *Id.* at 895.

151. *See id.* at 893.

152. *Id.* at 894.

employees makes proposals to management over time and management responds to these proposals by acceptance or rejection.¹⁵³

The Board also summarized the types of activities that would *not* run afoul of the Act as follows:

- a committee formed simply to engage in fact-finding on a specific topic would not be deemed a labor organization under Section 2(5);
- a committee formed to merely brainstorm ideas in the manner of a suggestion box would not be a labor organization; and
- a committee that, even though dealing with bargainable topics, has been specifically delegated the task of deciding what to do by management would not be dealing with management under Section 2(5).¹⁵⁴

For example, there would be no dealing with management if the committee was governed by majority decision-making, management representatives were in the minority, and the committee had the power to decide matters for itself, rather than simply making proposals to management.¹⁵⁵

In the instant case, however, the Board found that the committees were indeed labor organizations dealing with the employer on Section 2(5) subjects.¹⁵⁶ On the question of domination, the Board also found that the employer dominated the committee in violation of Section 8(a)(2), in part because the employer retained veto power over any action of the committee, controlled the number of employees on the committee, and retained the right to eliminate the committees at will.¹⁵⁷

Since *Electromation* and *du Pont*, the Board has attempted to accommodate management needs to some degree against the dictates of Section 8(a)(2). For example, in two cases, the Board ruled that committees that served basically as “suggestion box” programs were not labor organizations.¹⁵⁸ Suggestion boxes and brainstorming groups do not violate

153. *See id.*

154. *See id.*

155. *Id.* at 895.

156. *Id.* at 895–96.

157. *Id.*

158. *EFCO Corp.*, 327 N.L.R.B. 372, 372 (1998).

the Act where the purpose is merely to develop ideas that management may or may not adopt.¹⁵⁹

Likewise, in *Georgia Power Co.*, enforced in 2005,¹⁶⁰ the Board found that the employer's creation of a Workplace Ethics Program did not violate the Act.¹⁶¹ The committee did not exist to deal with the employer, but rather made management-level decisions regarding ethics complaints filed by employees.¹⁶² In doing so, the Board majority reversed the administrative law judge who had found that the Workplace Ethics Program was not "a purely managerial decision making vehicle," but was instead a grievance committee "designed to provide employees with a different procedure for resolving" managerial decisions without resorting to the union.¹⁶³ However, although the Board did not find an 8(a)(2) violation, it did find that the employer violated Section 8(a)(5) when it went further and *implemented* ideas brought forth by the program's committee without negotiating over those changes with the union.¹⁶⁴ In addition, another committee formed to provide input on choosing a crew chief leader was also not deemed a labor organization because the employer was only looking for input from the employees and had also made clear that the process of selecting crew chiefs would not change without negotiations with the union.¹⁶⁵ There had been complaints about the process of selection; management sought employee input regarding the process but had also assured the union that no changes would be made without negotiations.¹⁶⁶ The committee met twice and made recommendations to management.¹⁶⁷

The Board underscored the principle that "an employer may lawfully

159. See, e.g., *id.*; *Polaroid Corp.*, 329 N.L.R.B. 424 (1999) (noting other types of committees proposed by the employer did indeed run afoul of the NLRB prohibitions against "dominating" labor organizations). See generally *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* (John E. Higgins, Jr. ed., 6th ed. 2012).

160. See *Ga. Power Co. v. NLRB*, 427 F.3d 1354, 1361 (11th Cir. 2005) (enforcing *Ga. Power Co.*, 342 N.L.R.B. 192 (2004)).

161. See *Ga. Power Co.*, 342 N.L.R.B. 192, 194 (2004) (holding further that bypassing the already recognized union by implementing the Workplace Ethics Program constituted direct dealing in violation of Section 8(a)(5) of the NLRA).

162. *Ga. Power Co.*, 427 F.3d at 1356.

163. See *Ga. Power Co.*, 342 N.L.R.B. at 200–01.

164. *Id.* at 192.

165. *Ga. Power Co.*, 427 F.3d at 1360.

166. *Ga. Power Co.*, 342 N.L.R.B. at 192–93.

167. *Id.*

consult with its own employees in formulating proposals for bargaining,” citing *Permanente Medical Group*.¹⁶⁸ In applying that principle to the instant case, the Board noted that the employer had gone out of its way to indicate that no changes would take place without negotiations with the union and that the committee was only providing ideas to help management make proposals to the union.¹⁶⁹ The Board cross-referenced *E. I. du Pont de Nemours & Co.*, noting that an employer may lawfully form an employee “brainstorming” group to develop a host of ideas from which the employer may use to develop formal proposals.¹⁷⁰

In *Bradford Printing & Finishing*, the Board found that a “Guiding Coalition” was a labor organization dominated by the employer.¹⁷¹ The Guiding Coalition was created by the company chief executive who told employees that it would address “such issues as work hours, holidays, attendance, discipline, and grievances.”¹⁷² That executive also said that a union was “not necessary” because the Guiding Coalition would “be a perfect forum to get involvement from all ranks and the Guiding Coalition will be able to address all issues and concerns in a timely and fair manner.”¹⁷³ The Guiding Coalition had an equal number of managers and employees and was presided over by the president, who also set the agenda.¹⁷⁴

In *Dow Chemical Co.*, various HR teams consisting of union employees and supervisors were not deemed to be labor organizations.¹⁷⁵ Rather they were deemed managerial teams “engaged in activity which management had previously done,” such as “posting jobs, interviewing applicants for jobs, and making a recommendation as to who would be hired, working on vacation and coverage questions all of which management had heretofore done, holiday work schedules . . . scheduling work and training which had heretofore been strictly a management prerogative.”¹⁷⁶ The teams

168. See *id.* at 193 (citing *Permanente Med. Grp., Inc.*, 332 N.L.R.B. 1143, 1144 (2000)).

169. *Id.*

170. *Id.* at 193 n.7 (citing *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993)).

171. *Bradford Printing & Finishing*, 356 N.L.R.B. 899, 905 (2011).

172. *Id.* at 899 n.2.

173. *Id.* at 903.

174. *Id.* at 905.

175. *Dow Chem. Co.*, 349 N.L.R.B. 104, 110 (2007).

176. *Id.*

were set up partly to reduce the number of supervisory personnel.¹⁷⁷ There was also a clear understanding that the HR teams could not get into matters reserved for the union and collective bargaining.¹⁷⁸

In summary, the overwhelming interpretation of the law that the Board has applied has been restrictive in regard to the use of committees as used in the spirit of global practices of codetermination. There have been a few types of exceptions, but they have been just that—exceptions—to their general rulings in this area.

C. Higher Education and Academic Collective Bargaining as the Exception to This Experience

Before turning to possible legislative solutions in this area, it may be instructive to review an exception to the general lack of coexistence of works-council practices and unions in U.S. industries: the field of higher education.¹⁷⁹ Colleges and universities have enjoyed a longstanding use of a works-council type of arrangement whereby faculty play an important role in the management of the organization and its “product.”¹⁸⁰ For more than a century, “U.S. colleges and universities have used a governance model that provides an extensive (and on some matters, an exclusive) decision making role for faculty.”¹⁸¹ Within this model, faculty members serve as “key advisors on a broad” range of “institutional policies and practices.”¹⁸² For instance, faculty input is sought “for executive level appointments,” such as “department chairs, deans, and academic executive administrators.”¹⁸³ “The central ‘product’ of an institution of higher education is its academic programs and degrees,” and few four-year institutions would consider offering a degree program without the proper review and approval by an “appropriate faculty governance mechanism.”¹⁸⁴ Consequently, via this

177. See *id.* at 108.

178. See *id.* at 110.

179. See Neil Bucklew, Christopher N. Ellison & Jeffery D. Houghton, *Shared Governance and Academic Collective Bargaining in American Higher Education: A Potential Model for U.S. Participation in the Global Experience of Works Councils and Codetermination*, 4 J. COLLECTIVE BARGAINING ACAD. 1, 1 (2012), <http://thekeep.eiu.edu/cgi/viewcontent.cgi?article=1044&context=jcba>.

180. *Id.* at 2, 7.

181. *Id.* at 7.

182. *Id.*

183. *Id.*

184. *Id.*

system of "shared governance," most institutions of higher education in the United States have adopted a variant of the works-council system.¹⁸⁵

"Faculty Senate" has been the most common term for this representative, elected council through which the faculty shares in the governance of the institution.¹⁸⁶ "[S]enior management of the institution consults regularly with the Senate," whose "advice and counsel" is considered "highly influential," if not actually determinative.¹⁸⁷ In recent decades, faculty unionization has become broadly established in U.S. higher education, yet many of these unionized campuses have maintained a shared-governance mechanism (i.e., faculty senate) while implementing a collective-bargaining relationship with the university.¹⁸⁸ In short, a works-council type of arrangement coexists with collective bargaining, and there have been no legal cases raised under the NLRB or any applicable state labor law challenging the continuation of shared governance via faculty senates in the face of growing unionization.

III. OPTIONS FOR CONSIDERATION

Few would argue that it is unimportant for the United States to encourage employee participation practices along the lines of works councils that hold promise for global competitiveness. However, moving further in this direction will require close scrutiny and possible changes in the labor-law prohibition that has become a critical barrier. In this Part, this Article identifies three possible options for approaching this issue.

A. Option One

This approach relies on the NLRB to continue to manage policy development regarding changing management practices and the interpretations of the National Labor Relations Act.¹⁸⁹ The assumption supporting this option is that the Board is well suited to oversee the development and potential expansion of works-council practices in the U.S. business structure as they relate to the traditions of labor-management relations.¹⁹⁰ Although some might argue that this option is simply a call for

185. *Id.*

186. *Id.*

187. *Id.*

188. *See id.* at 7-8.

189. *Id.* at 1.

190. *See id.*

maintaining the status quo, it is important to note that works councils are only one example of the changing world of workplace practices, and the agency charged with administering the National Labor Relations Act is quite capable of managing the interaction of traditional labor-management traditions relative to changing practices as needed.¹⁹¹

One danger with the status-quo approach is that it relies on a Board that has in recent years shown itself to be highly political in its approach to labor relations.¹⁹² With Board members appointed by the President and confirmed by the Senate, the party in power has had great influence in the direction the Board takes.¹⁹³ For example, Board appointees during the Reagan and Bush presidencies took decidedly pro-management positions on questions of close interpretation.¹⁹⁴ In contrast, the Clinton and Obama Boards took more pro-union stances.¹⁹⁵ Thus, the Board is an uncertain

191. *See id.*

192. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1368–1452 (2000) (tracing the increased prevalence of partisan Board members starting with President Eisenhower’s appointment of management lawyer Guy Farmer in 1953 through 2000); Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board’s Unfair Labor Practice Decisions through the Clinton & Bush II Years*, 37 BERKELEY J. EMP. & LAB. L. 223, 283 (2016).

193. *See Semet, supra* note 192, at 284 (noting that which political party holds power has little bearing on NLRB decisions but that majority party power is most effective when used during the nomination and confirmation process).

194. *Id.* at 231–32. *See generally* Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199 (2010). The Trump Board is poised to continue this pattern. *See, e.g., Hy-Brand Indus. Contractors (Hy-Brand I)*, 365 N.L.R.B. 156 (2017) (overruling *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 186 (2015) and reverting to “prior legal standard for determining whether two employers are joint employers under the National Labor Relations Act”). The Trump Board recently vacated *Hy-Brand I*—not on substantive grounds but on ethical grounds. *See Hy-Brand Indus. Contractors (Hy-Brand II)*, 366 N.L.R.B. 26 (2018) (vacating *Hy-Brand I* on grounds that Board Member William Emanuel should have recused himself from participating in that decision because of his firm’s role in representing one of the putative joint-employers in *Browning-Ferris*).

195. Compare Semet, *supra* note 192, at 225 (citing STAFF OF H.R. COMM. ON OVERSIGHT & GOV’T REFORM, 112TH CONG., PRESIDENT OBAMA’S PRO-UNION BOARD: THE NLRB’S METAMORPHOSIS FROM INDEPENDENT REGULATOR TO DYSFUNCTIONAL UNION ADVOCATE 4 (Comm. Print 2012), <http://oversight.house.gov/wp-content/uploads/2012/12/NLRB-Report-FINAL-12.13.12.pdf> (detailing a range of criticisms of the Obama Administration and its NLRB, including decisions that were seen to be “reinterpretation of decades-old labor law”)), with H.R. 3459, “Protecting Local Business Opportunity Act”: Hearing on H.R. 3459 Before the Subcomm. on Health,

vehicle for the future. When Democrats are in power, the NLRB is likely to oppose the establishment of committees that touch upon conditions of employment, wary that management will use such committees to undercut their certified unions or to prevent future unionization.¹⁹⁶

B. Option Two

This approach would make some minimal changes to the law itself before once again relying on the NLRB to apply the changed law. The change that would be made to the National Labor Relations Act would be an acknowledgement of the global impact of works-council practices and would become a requirement for attention by the NLRB. One method for making such a change in the law might be an amendment to Section 8(a)(2)¹⁹⁷ of the statute to read:

It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided, That [it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity in which employees participate, to discuss matters of mutual interest which focus on issues of quality, productivity and efficiency. These entities cannot have, claim, or seek authority to negotiate or enter into collective bargaining agreements with the employees or to amend existing collective bargaining agreements between the employer and any labor organization.]*¹⁹⁸

The key assumption under this option is that the addition of such a clear statement regarding the right of an employer to invoke and use works councils would require the NLRB to recognize that right when administering the National Labor Relations Act. The Board would need to permit such

Emp't, Labor & Pensions of the H. Comm. on Educ. & the Workforce, 114th Cong. 56–64 (2015) (statement of Anne Marie Lofaso, Professor, West Virginia University College of Law) (explaining, for example, that the Obama Board's *Browning-Ferris* decision on joint-employer status was merely reverting to the long-standing common law definition, which itself had been precedent for a century but which the Reagan Board had overturned, and thus taking issue with the characterization of this definition as a “radical departure of long-standing law”).

196. See Semet, *supra* note 192, at 226–27 (noting Democratic appointments are likely to result in decisions more favorable to unions).

197. See National Labor Relations Act of 1935 § 8(a)(2), 29 U.S.C. § 158(a)(2) (2012).

198. *Id.* The italicized text is the Authors' proposed addition to the existing statutory language.

developments as long as they do not undermine or threaten the role of the exclusive bargaining agents as provided for in the law. This change would allow employers to use works councils, but would make sure these entities could not become employer-dominated unions.

C. Option Three

This approach would involve a more concerted modification of the NLRA in the matter of developing works-council practices. It would not only confirm the right of employers to adopt such practices, but would provide guidance on how these practices would function in cases where no bargaining agent exists and in cases where there is a bargaining agent in place. Language would be added to the appropriate sections of the National Labor Relations Act declaring that it is now public policy to support the development of works-council practices in the workplace as well as to preserve the longstanding right of employees to select bargaining representatives of their own choosing. In addition, this declaration would note the desirability of these practices as a way of encouraging company effectiveness and international competitiveness.

In a way, this approach would parallel and update the underlying policies of the Act much in the same way the original drafters of the Act wanted to state their primary purposes.¹⁹⁹ Indeed, while rarely cited, the current Act begins with a long policy statement on the benefits of collective bargaining and the impact of labor strife on the U.S. economy.²⁰⁰ This opening statement maintains:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

....

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when

199. See, e.g., S. 2926, 78 CONG. REC. 3443 (1934) (enacted).

200. See National Labor Relations Act of 1935 § 1, 29 U.S.C. § 151 (2012).

they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.²⁰¹

This original purpose clause could certainly stay intact, but it could be expanded to bring the Act into the twenty-first century to better reflect the more modern global trends toward worker participation. Thus, an additional clause could be added to that same preamble section that would read as follows:

The Congress is also mindful of international developments in labor-management relations and of the development of more collegial models of employee/employer interaction in other countries and the attendant benefits of such models. Such experiences have demonstrated that the most efficient and effective way to keep America competitive in the global economy of the 21st century is to draw upon the skills, experience and expertise of the American worker. Accordingly, it is also the declared policy of the United States to encourage workplace models that increase communication between employees and management and to provide mechanisms for discussions between employees and management on ways to improve the quality of product; efficiencies in production and harmony in the workplace. So long as such mechanisms do not directly interfere with the legitimate prerogatives of duly certified labor organizations, or the freedom of employees to select representatives of their own choosing, nothing in this Act shall consider such co-determination models to be in violation of the law.

In addition to this declaration, language could be added creating guidelines for the implementation of works councils within the context of labor-management practices as fostered by the NLRA. These guidelines could include approaches such as the following:

1. *Alternative One*

A clause could be added to Section 8(a)(5) and/or Section 9(a) that allows an employer to deal with works councils on a wide range of mutual concerns and not be guilty of bad-faith bargaining provided that the committee action did not contravene a specific clause of any collective-bargaining agreement in effect. The exclusive bargaining agent would have

201. *Id.*

the right to negotiate over the effect of any committee decision adopted by the employer that impacts wages, hours, and working conditions.

Because the “refusal to bargain” language of Section 8(a)(5)²⁰² cross-references Section 9(a),²⁰³ it may be easiest to simply amend Section 9(a) as follows:

Exclusive representatives; employees’ adjustment of grievances directly with employer[:]

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.²⁰⁴

[Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Provided further, that nothing shall preclude the establishment of employee committees or works councils and for employers to deal with such committees for the purposes of enhancing workplace efficiency, productivity, product quality or other matters of mutual interest so long as such interaction does not otherwise interfere with employee rights to select a representative of their own choosing.

In cases where employees are already represented by a labor organization, employers and employee committees may implement changes in working conditions to achieve their mutual goals so long as such changes are not inconsistent with the terms of a collective-bargaining contract or agreement then in effect and provided further that any bargaining representative has had the opportunity to review the proposed

202. *Id.* § 8(a)(5), 29 U.S.C. § 158(a)(5).

203. *Id.* § 9(a), 29 U.S.C. § 159(a).

204. *Id.*

changes before they are put into effect and, where necessary, bargain over the impact of the changes.]

2. Alternative Two

A clause would be added to Section 8(a)(2),²⁰⁵ stating that employers are fully authorized to establish works councils and worker committees, deal with them, and establish policies and practices with them *unless* the totality of the circumstances show that the employees may reasonably conclude that they could not organize on their own or that management had thrust a substitute for collective bargaining upon them. An additional requirement in this section would be that employers must assure employees in writing of their continued right to freely form a union. This posting would be designed to assure employees that, despite the works councils dealing with wages, hours, and working conditions, they as employees can still exercise their traditional right to form a union.

One approach to do this could involve utilizing Member Raudabaugh's four-part test for establishing unlawful domination from *Electromation*²⁰⁶ and incorporating it into the Act. Thus, if this approach were used, the definition of labor organization in Section 2(5) would remain the same,²⁰⁷ but Section 8(a)(2)²⁰⁸ could be specifically modified by adding the following to the current language:

In deciding whether or not an employer has violated this section in cases where it has formed or interacts with employee committees that may deal with bargainable subjects, the Board shall consider: (1) the extent of the employer's involvement in the structure and operation of any employee committee; (2) whether the employees, from an objective standpoint, reasonably perceive the employee committee as a substitute for full collective bargaining through a traditional labor organization; (3) whether employees have been assured of their Section 7 right to choose to be represented by a traditional labor organization under a system of full collective bargaining; and (4) the employer's motive in establishing or dealing with the committee and whether it has been formed in order to impede the free choice of employees in selecting their own representatives.

205. See *id.* § 8(a)(2), 29 U.S.C. § 158(a)(2).

206. See *Electromation, Inc.*, 309 N.L.R.B. 990, 1013 (1992).

207. National Labor Relations Act of 1935 § 2(5), 29 U.S.C. § 152(5).

208. *Id.* § 8(a)(2), 29 U.S.C. § 158(a)(2).

IV. CONCLUSION

Global competitiveness is a requirement for U.S. employers. Works-council practices appear to be a critical component of this evolving global economy.²⁰⁹ The unique circumstances of U.S. labor law and the limitations on the development of works-council practices given the interpretation of the law has become an important issue to address.²¹⁰ Higher education and academic collective bargaining serves as an exceptional example, showing that works councils and collective-bargaining processes can coexist.²¹¹ It is imperative that consideration be given to the potential revision and amendment of the National Labor Relations Act. There are numerous approaches to consider. This Article, which has suggested three such options, is intended to initiate further discussion of this topic and an assessment of the options proposed.

209. See generally WADDINGTON, *supra* note 11, at 1 (describing the purpose of the European Works Council).

210. See *supra* Part II.B.

211. See *supra* Part II.C.